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Supreme Court of the United States

OCTOBER TERM, 1968

No. 1080

THE FLUOR CORPORATION LIMITED AND COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

Petitioners,

versus

KENNETH H. CUNNYNGHAM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

ADAMS AND REESE

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versus

KENNETH H. CUNNYNGHAM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is a petition for a writ of certiorari as authorized by the Supreme Court Rule 23.

Petitioner prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered and rendered in the Fluor Corporation case on October 31, 1968, rehearing denied November 29, 1968.

CITATION TO THE OPINIONS BELOW

The first judgment of the United States District Court for the Eastern District of Louisiana, New Or-

leans Division in "Cunnyngham V. Fluor Corporation" is not officially reported, but appears in appendix A and is entered in the record at pages 41-49.

The first judgment by the United States Court of Appeals for the Fifth Circuit entitled "Cunnyngham Vs. Donovan" is reported in 328 Fed. 2d 694 (Fifth Cir., 1964) and also appears in a record of "Fluor Corporation Vs. Cunnyngham" in the Fluor Corporation record at pages 55 and 56; the decision of the Court is printed in the appendix B hereto.

The second judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, in "Cunnyngham Vs. The Fluor Corporation" is officially reported at 271 F. Supp. 508, (E.D. La., 1967) and is printed in Appendix C hereto, and also appears in a record of the "Fluor Corporation Vs. Cunnyngham" in the Fluor Corporation record at pages 69-80.

The second opinion of the United States Court of Appeals for the Fifth Circuit, dated October 31, 1968, in the "Fluor Corporation vs. Cunnyngham" is officially reported at 403 Fed. 2d 223, 1968, and appears in the record on pages 123 through 127 and is printed in Appendix D.

A petition for a rehearing in the United States Court of Appeals for the Fifth Circuit was denied on November 29, 1968. (See Appendix F.)

JURISDICTION

The judgment of the Court of Appeals was made and entered on October 31, 1968. The petition for rehearing was denied on November 29, 1968. The jurisdiction of this court is envoked under Title 28 USC § 1254 (1).

QUESTIONS INVOLVED

When is a person *"totally disabled"* under the Longshoremen's and Harbor Workers' Act, 33 USC 901, et seq., as made applicable under the Defense Base Act, 42 USC § 1651-1654?

Phrased differently, the issue can be stated: Is a person totally and permanently disabled when he can no longer earn the same wages he was making at the time of his injury?

Secondly, whether a District Court can overturn a Deputy Commissioner's denial of an award if the decision was supported by substantial evidence on the record considered as a whole.

STATUTES INVOLVED

Pertinent portions of the statutes involved are:

1. The Defense Base Act, 42 USC § 1651 §1651 - Compensation authorized - Places of employment

a. "Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment. . . ."

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 § 908
§ 908 - Compensation for disability
a. "Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. *In all other cases permanent total disability shall be determined in accordance with the facts.*" (emphasis added)

STATEMENT OF THE CASE

Kenneth H. Cunnyngham was injured on the job on December 20, 1953, while he was engaged in a construction job of an Air Force base for the United

States government at Dhaharan, Saudi Arabia. Mr. Cunnyngham was paid all of his medicals and the maximum amount allowable under the Longshoremen's and Harbor Workers' Act for temporary total disability and permanent partial disability.

In April, 1955, the Deputy Commissioner in Seattle, Washington denied a claim by Cunnyngham for total and permanent disability.

Thereafter the claimant worked at various construction jobs until around 1960.

In 1960 claimant filed a claim for total and permanent disability as a result of his 1953 accident.

In August, 1961, a hearing was held before the Deputy Commissioner, where numerous witnesses were called, after which the Deputy Commissioner denied claimant's petition for total and permanent disability.

This decision was affirmed by the United States District Court, Eastern District of Louisiana (See Appendix A).

The case was then brought up to the Fifth Circuit where the decision of the District Court was reversed and remanded for a retrial for additional factors to be taken into consideration. (See Appendix B)

A second hearing was held before the Deputy Commissioner, which lasted two days, after which the

Deputy Commissioner again denied the claimant's petition for total and permanent disability.

The District Court, then without the taking of any testimony then overturned the decision of the Deputy Commissioner and entered an award for total and permanent disability stating that the claimant could not successfully compete in the labor market or command the same wage as he did in 1953 when he was injured.

The Fifth Circuit on the second hearing simply referred to its first decision in this case and affirmed the lower Court's reversal of the Deputy Commissioner's order.

REASONS FOR GRANTING THE WRIT

THE COURT USED AN INCORRECT TEST IN FINDING THE PETITIONER WAS TOTALLY, PERMANENTLY DISABLED

The District Court, after the second hearing, we feel used an incorrect test to determine whether the petitioner was in fact "totally disabled." We submit the District Court applied the "disabled test" of 33 U.S.C. § 902 (10) rather than the "totally disabled test." We have no argument with the fact that the petition was permanently partially disabled or "disabled." But do contend that the deputy commissioner was correct in saying the petitioner was not "totally disabled" since the petitioner could earn and

did in fact earn wages after his accident. The District Court, at page 33, Appendix C, stated:

> "No evidence was introduced, on either hearing, tending to show that petitioner could compete successfully in the labor market or command the same wage proportionately speaking, as he did in 1953 WHEN he was injured. * * * *he cannot expect to be compensated at his former scale.*

We submit that the Fifth Circuit in affirming the decision of the Trial Court *deviated* from the standard set up previously by the Fifth Circuit in the case of "Goodfrey V. Henderson," 222 F 2d 845 (Fifth Cir., 1955) where the Court stated at page 849:

> "*Total Disability* would seem to exist when there is a *complete incapacity to earn wages in the same or any other employment.*" (emphasis added)

The First Circuit in the case of Eastern Steamship Lines V. Monohan, 110 F 2d 949 (First Cir., 1940) stated a person would not be considered *totally disabled,*

> ". . . if there is an availability to do work of a limited nature and that work is available in the community in which the employee resides, and can be procured by him."

The use by the District Court of a new standard for the determination of *total disability,* and the affirmance of this decision of the Fifth Circuit, sets up conflicting standards between the First and Fifth Circuits, and a deviation from a prior Fifth Circuit decision.

SECONDLY, THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE DEPUTY COMMISSIONER'S FINDING

First, it cannot be denied that Cunnyngham was able to earn wages and did in fact earn wages for five years after his accident.

The first job he held after his accident was with a construction firm in Idaho. His job was to install steel window frames and other metal parts on the school. He worked on this project until the work for which he was hired was completed and during this four month period, he received a 12 cent an hour increase in wages from $2.85 an hour to $2.97. The construction Superintendent said this of the claimant's work.

> "I observed and knew that he had an artificial leg; however, in spite of this handicap, Mr. Cunnyngham performed his metal work in an excellent manner; that this type of work requires great manual and physical dexterity, and he was very efficient in the performance of his duties; that he never complained of or refused any work pertaining to this particular

> work as long as he was working for me; that, during the period that he worked for me from June 24, 1955, until August 26, 1955, he never missed a day's work; that Mr. Cunnyngham was paid scale of $2.85 and was well worth his pay; that Mr. Cunnyngham, upon the completion of this particular contract, on or about August 26, 1955, was laid off."

Another one of the jobs Cunnyngham held after his accident was that of a draftsman. He worked on this job for 2 1/2 years and during this period put in substantial amounts of overtime.

As a result of the testimony and documentary evidence, the deputy commissioner concluded that the claimant was not totally and permanently disabled within the meaning of the Act. (See complete Review of Testimony in Appendix E)

In the second hearing, it was learned that the claimant had not tried to get a job since 1961 nor when he was offered an opportunity to get a job in which he could have worked, he showed no interest at all in obtaining the employment, rather he showed a great reluctance to even go over and take the test.

Thus, from the foregoing testimony again the Deputy Commissioner, at the second hearing, found that the claimant was not permanently and totally disabled. In the case presently before the court, the Deputy Commissioner's findings were not merely dependent upon the unreliability of the claimant's testi-

mony standing alone. But from what has been observed earlier, there was affirmative testimony that the claimant, if he had the desire to do so, could perform work of the type of which he was familiar with and which was available in the area in which he lived. This evidence, to which the Deputy Commissioner gave credence, demonstrated that the claimant's failure to work was due to personal evasiveness on his part. Certainly there was nothing in the record to show that this evidence was unworthy of belief. Certainly there was nothing to indicate that the company which would have hired the claimant, as it had hired other similar handicapped persons, had any ulterior motive in offering to hire him or that it had any interests in the outcome of the present case. It was undisputed that this firm had no connection with the compensation employer.

Claimant's demonstrated ability to work after his injury without loss of wages, as detailed in Judge Ainsworth opinion in the earlier consideration of this controversy, the existence of unaccepted opportunities made available to claimant through State Agencies and private employers, and claimant's current lack of good faith desire to work, negate any claim of a disability which is total and which is required to be determined in accordance with the facts. 33 U.S.C. Section 908(A). Clearly on the existing record, it cannot be said that, the deputy commissioner's findings were unsupported by the record, O'Leary Vs. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951), nor that the Deputy Commissioner's determination was irrational, O'Keefe

Vs. Smith-Hinchman & Grylls, 380 U.S. 359, 85 S. Ct. 1012, 13 L. Ed. 2d 885 (1965).

CONCLUSION

For the reasons set for the above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted

ADAMS AND REESE

Henry B. Alsobrook, Jr.
James E. Blazek
847 NBC Building
New Orleans, Louisiana

CERTIFICATE

This is to certify that I have this day mailed a copy of the above and foregoing Petition for a Writ of Certiorari to Leonard Fuhrer, Attorney at Law, 602 Murray Street, Alexandria, Louisiana.

This ____ day of February, 1969.

JAMES E. BLAZEK

APPENDIX "A"

JUDGMENT

(Number and Title Omitted)

(Filed Nov. 6, 1962)

Vance Thompson, Alexandria, Louisiana
James David McNeill, New Orleans, Louisiana
Attorneys for Plaintiff

Gene S. Palmisano, Assistant United States Attorney, New Orleans, Louisiana
Attorney for Defendant

AINSWORTH, District Judge:

Complainant has brought this action entitled "Civil Action for Compensation Order under the Longshoremen's and Harbor Workers' Compensation Act and Defense Bases Lands Act and Laws Amendatory and Supplementary" and seeks the injunctive relief authorized by Section 921 of the Longshoremen's and Harbor Workers' Compensation Act.[1]

Defendant, the Deputy Commissioner for the Seventh Compensation District, Bureau of Employees' Compensation, has filed a motion for summary judgment on the following grounds:

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[1]33 U.S.C.A. 901, et seq., hereinafter referred to as "the Act."

(1) That the court lacks jurisdiction because the proceedings for judicial review were not commenced timely; and, alternatively,

(2) That there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law because the finding of the Deputy Commissioner (that claimant is not totally and permanently disabled) is supported by the record considered as a whole.

On December 30, 1953, plaintiff was injured outside the Continental United States while performing work of a hazardous nature as a structural iron welder. Compensation was paid by his employer's insurer until January 1960 on the basis of temporary total disability (injury to his right leg) and permanent partial disability (loss of his left leg), in the total sum of $11,000 (the maximum amount for such disability under the Act at the time of the injury).[2] Plaintiff also received medical attention and was fitted with an artificial leg. On November 10, 1960, plaintiff filed a claim for additional benefits alleging permanent and total disability as a result of his injury. A formal hearing was held by the Deputy Commissioner on August 30, 1961, and the claim for additional compensation was rejected by order of the Deputy Commissioner on November 29, 1961. This order was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of March 7, 1927, 44 Stat. 1424, 33 U.S.C. 901, et seq., as made

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[2]Section 14(m) of the Act.

applicable to employment at certain defense base areas and elsewhere by the Act of August 16, 1941, as amended, 55 Stat. 622, 42 U.S.C. 1651-1654.

Thereafter, within the 30-day period allowed by the Act for review of compensation orders and injunctive relief,[3] plaintiff filed a suit for additional compensation in the Western District of Louisiana, wherein he resides, naming his employer and its insurer as defendants. Plaintiff failed to name the Deputy Commissioner as a defendant but prayed that a subpoena duces tecum issue to him for production of the testimony taken at the hearing and other records in his possession.

On May 24, 1962, the Honorable Edwin F. Hunter, a District Judge for the Western District of Louisiana, rendered an order dismissing plaintiff's suit because of his failure to make the Deputy Commissioner a party to the suit, however preserving plaintiff's right under the Act. The pertinent part of the court's order reads as follows:

> "We will not make final the compensation order of the Deputy Commissioner; and nothing herein contained is to be construed as affecting the right of Mr. Cunnyngham to proceed forthwith in accordance with Section 21 of the Longshoremen's and Harbor Workers' Act."

---

[3]Section 921 of the Act.

Because of Judge Hunter's order declining to attach finality to the compensation order, we are constrained to entertain jurisdiction and to review the order of the Deputy Commissioner as authorized by Section 921 of the Act.

Inasmuch as plaintiff has been paid the maximum amount of compensation allowed under the Act for temporary total disability and permanent partial disability, the extent of his disability is immaterial as affecting the amount of compensation to which he is entitled, unless he is totally and permanently disabled. Consequently, the only question to determine is whether the finding of the Deputy Commissioner that plaintiff is not totally and permanently disabled is supported by substantial evidence on the record considered as a whole.[4]

It was conceded at the hearing that plaintiff was injured during the course and scope of his employment; that the injury resulted in the consequent amputation, above the knee, of plaintiff's left leg; that there was an injury also to his right leg; that at the time of the injury claimant's average weekly wage was in excess of $52.50

The following is a summary of plaintiff's employment record *subsequent* to the injury complained of:

May 24, 1955 to August 26, 1955 - Plaintiff was

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[4]O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Universal Camera Corp. v. National Labor Rel. Bd. 340 U. S. 474 (1951).

employed by Busboom & Raugh, general contractors, through the union, as a member of a crew to install steel window frames, steel handrails and other incidental metal work in the construction of a school building at an hourly rate of $2.85, later increased to $2.97; he had a regular work week of 40 hours, he was terminated at the completion of the particular project. An affidavit of the Construction Superintendent on the project shows that plaintiff "performed his work in an excellent manner"; that he was "very efficient in the performance of his duties"; that "this type of work requires great manual and physical dexterity"; that plaintiff never complained of or refused any work on the job, never missed a day's work, and "was well worth his pay."

September 1955 - Plaintiff was employed for two days by Dealles Organ, through the union, in steel construction of a handrail, at the union scale rate of pay. Plaintiff states that he was not allowed to continue the job because "It was too dangerous."

April 1956 to September 1956 - Plaintiff was employed by American Bridge Company, through the union, to put up handrails, at the union scale rate of pay. He voluntarily left this job to return to work with the Fluor Corporation, his former employer at the time of his injury.

September 1956 to January 1959 - Plaintiff was employed by the Fluor Corporation as a "Designer C" at an hourly rate of $1.875 which was increased by three wage raises to $2.13. He worked a substantial

number of hours overtime on this job, up to 15 hours a week. His employment, which was satisfactory at all times and performed without complaints or difficulties, was terminated due to a reduction in force.

June 15, 1959 to July 31, 1959 - Plaintiff was employed by Pacific Scientific Corporation as a welder burner at an hourly rate of $2.30. Plaintiff worked as many as 11 hours overtime a week on this job. His work was performed satisfactorily; he left voluntarily to accept employment with the Fluor Corporation.

August 3, 1959 to November 11, 1959 - Plaintiff was employed by the Fluor Corporation as a "Designer C." In November of 1959, plaintiff requested and received a 90-day leave of absence to visit his father in Louisiana who was ill. His employment was terminated when the work load at Fluor decreased to such an extent that his services could not be utilized. During this period of employment with Fluor, in addition to his duties, he took a night course in the study of Piping Drafting Room Practice.

On August 25, 1960, plaintiff was issued a license as a life insurance agent by the State of Louisiana. He made one sale for which he received a commission of approximately $130.

Plaintiff is able to drive his own car, to use a lawn power mower, to do odd jobs such as wiring an attic of a house, etc. He is a high school graduate and is able to read and write.

The Deputy Commissioner rejected the claim of plaintiff for additional benefits for the following reasons:

> "1. The claimant has not been permanently and totally disabled from work as a result of the injury of December 30, 1953.
>
> "2. The employer and insurance carrier have already paid compensation to the claimant in the sum of $11,000, which sum represents the maximum liability of the employer and insurance carrier under the Defense Bases Compensation Act at the time of the injury on December 30, 1953."

The Act [Section 902 (10)] defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Section 908(a) of the Act provides that "permanent total disability shall be determined in accordance with the facts" (except under specified circumstances not pertinent here).

After a study of the record, we find that the findings of fact of the Deputy Commissioner, which must be presumed to be correct,[5] are supported by substantial evidence on the record considered as a whole, and consequently must be accepted[6] as final and con-

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[5] *Burley Welding Works v. Lawson*, 141 F. 2d 964, 5 Cir. (1944).

[6] *O'Leary v. Brown-Pacific-Maxon, Inc.*, supra, *Universal Camera Corp. v. National Labor Rel. Bd.*, supra.

clusive and may not be set aside on judicial review Logical deductions and inferences which may be and are drawn by the Deputy Commissioner from the evidence may not be set aside even if the evidence permits conflicting inferences. Plaintiff's burden to show that the evidence before the Deputy Commissioner does not support the compensation order[7] has not been met.

Defendant's motion for summary judgment is therefore granted.

/s/ Robert A. Ainsworth, Jr.
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
November 6, 1962

[7]*Mississippi Shipping Company v. Henderson*, 231 F. 2d 457, 5 Cir. (1956); *Southern Stevedoring Co. v. Henderson*, 175 F. 2d 863, 5 Cir. (1949).

APPENDIX "B"

Kenneth H. CUNNYNGHAM,
Appellant,

versus

P. J. DONOVAN, Deputy Commissioner
Seventh Compensation District,
Bureau of Employees, Compensation,
Appellee.

No. 20420.

United States Court of Appeals
Fifth Circuit.
March 2, 1964.

CAMERON, Circuit Judge.

This appeal presents two questions, the second answer being dependent on the answer to the first. Initially, we must decide whether the lower court had jurisdiction of the subject matter. If this query should be answered in the affirmative, then we must decide whether the loss of one leg and the loss of thirty-five percent use of the other leg amounts to permanent and total disability within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.[1] Both questions must be answered in the affirmative.

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[1] 33 U.S.C.A. § 908(a).

Appellant was in the employ of the Fluor Corporation, Ltd. at the time of his injury on a location outside the continental United States. Liability of the employer was insured by the Commercial Insurance Company of Newark, New Jersey. Appellant, while performing services for his employer as a structural iron welder, sustained personal injuries on December 30, 1953 resulting in his disability. During this period, appellant was working in a ditch under some eight-inch diameter pipe when the 4" x 4" bracing timbers broke, causing the structures to fall on him. Appellant's legs were violently compressed between two strands of pipe, resulting in a crushing injury to the left leg, requiring amputation above the knee. The right leg had a fracture of the lateral tibial plateau and a fracture of the head of the fibula. The employer and the insurance carrier furnished appellant with medical treatment in accordance with the provisions § 7(a) of the Longshoremen's and Harbor Workers' Compensation Act. As a result of this injury, appellant received Eleven Thousand Dollars as compensation for temporary total disability and permanent partial disability. Appellant worked, on and off, at different jobs from October 22, 1954 to November 10, 1960.

On November 10, 1960, appellant filed a claim for additional benefits on the basis that he is permanently and totally disabled as a result of the December 30, 1953 injury. The Deputy Commissioner filed a compensation order on November 29, 1961, rejecting appellant's claim. Appellant filed a complaint in the

District Court for the Western District of Louisiana within the thirty-day period required by the Act[2] against Fluor Corporation, its insurer and P. J. Donovan, as an incidental defendant. The District Court for the Western District of Louisiana extended the thirty-day period of limitation provided for filing of actions.[3] Appellant filed a complaint in the District Court for the Eastern District of Louisiana on May 31, 1962, to have set aside a compensation order of November 29, 1961 of appellee Deputy Commissioner, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.[4]

The Deputy Commissioner filed a motion to dismiss or, in the alternative, for summary judgment.

I.

§ 21(a) of the Longshoremen's and Harbor Workers' Compensation Act[5] provides as follows:

> "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting side of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

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[2]33 U.S.C.A. § 921(a).
[3]In accordance with 5 U.S.CA. § 1009.
[4]33 U.S.C.A. § 901 et seq.
[5]33 U.S.C.A. § 921(a).

Subdivision (b) of § 21 provides in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District) * * *."

Subdivision (d) of § 21 reads as follows:

> "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

[1] Appellant obviously commenced the suit within the required thirty day period.[6] Appellant's injury, occurring outside the continental United States, did not, therefore, occur within any judicial district, as set forth in 33 U.S.C.A. § 921(b), supra. The Deputy Commissioner was made a party defendant in the suit in the Western District of Louisiana, as well as in the suit in the Eastern District. The District Court for the Western District of Louisiana merely extended the filing period. Both District Courts in Louisiana

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[6] 33 U.S.C.A. § 921(a).

had proper jurisdiction of the subject matter. Although appellant Donovan is the administrative officer for the Seventh Workmen's Compensation District, Bureau of Employees Compensation, United States Labor Department, the Seventh District embraces the entire State of Louisiana. We hold therefore, that the lower court had proper jurisdiction of the subject to render an opinion.

II.

[2] We do not believe a summary judgment should have been granted under the facts revealed by this record where, as a result of an injury, a man's left leg was amputated and his right leg was thirty-five per cent disabled. Of course, we are bound by the holding of the Commissioner on undisputed facts provided the holding is supported by substantial evidence. Walsh Stevedoring Co. v. Henderson, 5 Cir., 1953, 203 F.2d 501.

[3] We think, however, the appellant has met the burden of showing that the evidence before the Deputy Commissioner does not support the compensation order complained of. Cf. Mississippi Shipping Co. v. Henderson, 5 Cir., 1956, 231 F.2d 457.

[4] It is unquestioned, moreover, that the degree of disability cannot be measured by physical condition alone. Other factors must be considered, such as age, education, industrial history and the availability of work which appellant can do. See, e. g., Godfrey v. Henderson, 5 Cir., 1955, 222 F.2d 845. Appellant has had several jobs since his injury, but a

close examination of the facts reveals that they were only temporary jobs and not of a permanent nature partly, at least, because of the duration and extent of his injury.

We, therefore reverse and remand for a retrial in due course.

Reversed and remanded.

APPENDIX "C"

CROSS MOTION OF RESPONDENT FOR SUMMARY JUDGMENT

CASSIBRY, District Judge:

Petitioner, Kenneth H. Cunnyngham, was injured while employed by The Fluor Corporation on a construction project at an overseas United States military installation on December 20, 1953. As a result of his injuries, one leg had to be amputated above the knee, and he was left with a 35 percent permanent disability of the other leg. His employer paid him compensation aggregating $11,000 under the Defense Base Act, 42 U.S.C. 1651, et seq., which incorporates most of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. Claiming that his disability was not limited to the specific losses upon which these payments were based, petitioner filed a claim in

1960 for permanent total compensation benefits. After hearing, the Deputy Commissioner issued a compensation order denying further compensation.

Petitioner appealed from this order; it was affirmed by the District Court.[1] He then appealed to the Court of Appeals, Fifth Circuit, which court reversed the compensation order, holding:[2]

> "We think, however, the appellant has met the burden of showing that the evidence before the Deputy Commissioner does not support the compensation order complained of. Cf. *Mississippi Shipping Co. v. Henderson*, 5 Cir., 1956, 231 F.2d 457."

It then rendered the following decree:

> "We therefore reverse for a retrial in due course.
>
> REVERSED AND REMANDED."

Petitioner thereafter moved for judgment on the face of the record, but the disposition of this motion is not clear. In any event, the record was transmitted to the Deputy Commissioner for rehearing, including the admission of additional evidence, following which the Deputy Commissioner entered a

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[1]See record in Civil Action No. 12287, in the Eastern District of Louisiana, wherein Judge Ainsworth made detailed findings of fact.

[2]Cunnyngham v. Conovan, 328 F.2d 694 (1964).

second compensation order, again rejecting petitioner's claim.

From this second compensation order, the petitioner appealed to this Court and filed a motion for summary judgment on the record; respondent filed a cross-motion for summary judgment. Both motions having been duly briefed, argued and considered, I am of the opinion that petitioner is entitled to the relief he seeks. A considerable record was made on the first hearing before the Deputy Commissioner, including medical evidence and evidence as to petitioner's work record since the accident. It avails little to review this record in detail as the Court of Appeals, considering all of the evidence received on the first hearing, was held that this record did not support a denial of compensation. I agree with the Court of Appeals' decision.

For determination now are the two issues raised on the motions for summary judgment:

(1) Whether the Deputy Commissioner should have received additional evidence on the remand by the Court of Appeals; and, alternatively

(2) Whether the additional evidence which was received changed the picture to such an extent as to warrant an affirmance of the Deputy Commissioner's record denial of compensation.

Petitioner has argued that, despite the word "retrial" in the Court of Appeals' decree, the only pur-

pose of the remand was to have the Deputy Commissioner enter an order consistent with the Court of Appeals' opinion — that is, order the payment of compensation. He cites a number of cases wherein other reviewing courts have indicated that no additional evidence is admissible on such remands; wherein reviewing courts have simply rendered their own judgments without ordering a remand; wherein the reviewing courts have indicated that a remand is limited to a mere reconsideration of the existing record without reception of additional evidence; and wherein the reviewing court remanded with specific instructions to the administrative tribunal as to exactly what order it should enter on remand.

It is my opinion that, in the particular context of this case and considering the language of the Court of Appeals' opinion, there was actually no need for further evidence on the remand. Respondent-Deputy Commissioner and intervenors (the employer and its insurer) have taken the position that, when the Court of Appeals stated that "the degree of disability cannot be measured by physical condition alone" and that "other factors must be considered, such as age, education, industrial history and the availability of work which appellant can do" (328 F.2d 694, 697), it was in effect calling for additional evidence on these factors. I doubt this is the case; a full record was already before the Court of Appeals relating to these factors, and it is my opinion that it was merely indicating that these factors had been taken into account in reaching its decision.

It is of no moment, however, in view of the other conclusions I have reached, whether the Deputy Commissioner should or should not have held another hearing. I have fully considered the additional evidence as having been properly received, and I nevertheless find the second compensation order to be erroneous.

Briefly to review the facts, at the time of the accident in 1953, petitioner was a 36 year old man who was a welder and burner by occupation and whose work record before the accident was good. After recuperating from his injuries overseas, and being left with essentially the same disability he now has (i.e., loss of one leg above the knee and 35 percent permanent disability in the other leg), he did manage to hold several other jobs, with his former employer and others, for various periods of time until November 11, 1959. He has held no jobs since. Consequently, his entire post-injury employment picture was before the Court of Appeals when it reversed the first compensation order. That Court found that petitioner "has had several jobs since his injury, but a close examination of the facts reveals that they were only temporary jobs and not a permanent nature partly, at least, because of the duration and extent of his injury" (238 F.2d 694, 697).

The record of the first hearing contains the testimony of several witnesses, including some representatives of organized labor in the area of petitioner's work-experience, who related facts about unavailing efforts to obtain employment for petitioner following

his last job and who also testified generally as to the unlikelihood of his being able to obtain any substantial steady work due to his physical handicaps. In addition, there is evidence of a rather dismal period during which petitioner tried to get work and eventually quit trying. He has become a Welfare recipient, drawing $60.00 per month in public assistance at the time he filed this appeal.

If indeed, as respondent and intervenors contend, the Court of Appeals wanted further evidence on or reconsideration of the factors of age, education, industrial history and the availability of work which petitioner can do, the second hearing offers nothing to change the picture.

(1) *Age.* Petitioner was born March 18, 1917 and was 36 years old when he was injured. He was 44 years old at the time of the original hearing. He is now over 50 years old. The age factor is more adverse than it was when the Court of Appeals had the case.

(2) *Education.* Nothing has changed for the better with regard to this factor since the Court of Appeals had the case. If anything, the educational factor (in the sense of learned manual skills) is more adverse.

(3) *Industrial history.* Between the accident and first hearing, petitioner had some history of industrial work. Since the first hearing, he has had no employment.

(4) *Availability of work which petitioner can do.* The only new evidence on the second hearing which the Deputy Commissioner found worthy of mention in his second compensation order bears upon this factor. It appears that a local machine shop was willing to hire handicapped men such as petitioner and offered to let him take a welding test to see whether he possessed the requisite skill to qualify. The hearing was recessed, and petitioner took a welding test at the machine shop. He failed to pass. Commenting upon this test, the Deputy Commissioner states:

> That at a formal hearing held November 15, 1965 testimony was offered by a representative of Ike Haggard Machine Works that employment as a welder was available in the area of New Orleans, Louisiana, and for persons with physical handicaps such as suffered by the claimant; that the claimant submitted to examination at that employer's establishment on the same date and failed to demonstrate sufficient knowledge of the work to warrant being hired; that his inability to qualify for the employment was not a result of the injuries sustained on December 30, 1953.

This is the only finding the Commissioner made. It adds nothing to his previous finding which the Court of Appeals has already found to be inadequate to support his determinations.

The very essence of the notion that this extremely handicapped person could nonetheless hold substantial gainful employment is that he possessed a special skill which was desired in the labor market — welding. Thus, when it was demonstrated that he lacked this special skill, the very thing which might have made him employable was lacking.

Respondent and intervenors contend that the record shows petitioner did not try hard enough to pass the test, although petitioner himself claims he did his best. The Deputy Commissioner made no finding of fact bearing on this contention, and I am therefore not bound to assume either that he did or did not conscientiously try to pass the welding test. A review of the testimony does not persuade me that respondent and intervenors are correct, but even if I were to assume they were, I could not affirm the compensation order.

I do not believe, in view of the Court of Appeals' decision, that the burden was upon this seriously handicapped claimant to disprove his ability to obtain and hold any of the jobs which might conceivably be considered available to him, any more than it is incumbent upon a Social Security claimant to do so.[3] It is the reasonable availability, not the mere theoretical existence, of employment which determines disability under the Social Security Act,[4] and the tests

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[3]Baker v. Gardner, 3 Cir. 1966, 362 F.2d 864.
[4]Mankiewicz v. Celebrezze, 256 F. Supp. 351.

to qualify for disability benefits under that Act are probably more strigent than under the Longshoremen's Act.

No evidence was introduced, on either hearing, tending to show that petitioner could compete successfully in the labor market or command the same wage, proportionately speaking, as he did in 1953 when he was injured. The evidence is that he would have been paid the "going rate" had he obtained the employment. While he would have been paid the "going rate" there was no evidence as to whether the "going rate" was the Union scale which he had formerly earned or a special rate for handicapped employees. The Court of Appeals was not impressed by his work-record prior to the first hearing. Prior to his second hearing he had no employment. There was considerable testimony from labor leaders that, regardless of possible ability to pick up a job now and then, he cannot compete successfully in the labor market and that he cannot expect to be compensated at his former scale. As he grows older, his prospects will continue to diminish.

The Defense Bases Act (42 U.S.C. 1651, et seq.) incorporates the definition of "disability" of the Longshoremen's and Harbor Workers' Compensation Act, as set forth in 33 U.S.C. 902 (10):

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The extent of a claimant's disability must be evaluated, under this definition, in an economic sense rather than purely in medical terms.[5] The ability to earn in the open labor market, not the ability to secure exceptional consideration from a sympathetic employer, is the test under this definition.[6]

This is not to imply that petitioner lacks a physical or medical basis for claiming that he is disabled. That petitioner is severely handicapped cannot be denied. But essentially, the Act is oriented toward making an economic evaluation of the effect of a physical disability. I find that petitioner is, on the present record, permanently and totally disabled within the meaning and humanitarian intent of the Act.

On the matter of attorney's fees, petitioner's counsel argues that, considering back payments required to be brought up to date and future payments over petitioner's life expectancy, a compensation order in favor of petitioner will cause him ultimately to be paid approximately $67,000; that, applying by analogy the fee provisions of the Louisiana Workmen's Compensation Law (20 percent of the first $5,000 recovered and 10 percent of any additional recovery), a fee of $7,200 would be called for. A number of comparatively large fees awarded in penalty situations by Louisiana courts, are cited, including a $2,500 fee where there had not even been a trial on the merits, only a hearing and appeal on an excep-

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[5]John W. McGrath Corp. v. Hughes, 2 Cir. 1961, 289 F.2d 403.
[6]United Engineering Co. v. Pillsbury, 92 F. Supp. 898.

tion.[7] Maximum recovery under the Louisiana Act involves only a fraction of the recovery involved here; some of the recent fee awards approximate 20 percent of anticipated maximum recovery.

While on this Court's bench, Judge Ainsworth awarded a $3,000 attorney's fee in McCormick v. Donovan, 247 F. Supp. 175, a Longshoremen's case where approximately $6,000 in compensation had accrued to date. The instant case has been an unusually protracted and difficult piece of litigation. It has lasted almost seven years and has involved two hearings before the Deputy Commissioner, two appeals to this Court, two proceedings in the Alexandria Division of the Western District of Louisiana, an appeal to the Fifth Circuit Court of Appeals and may yet involve another appeal to that Court. In view of these factors, I believe an attorney's fee of $6,500 should be authorized.

I therefore find: That petitioner is presently incapable of earning the wages which he was receiving at the time of his injury on December 20, 1953; that such incapacity results from such injury and will be total and permanent; that the value of the services rendered by petitioner's counsel to date is $6,500; that the compensation order rendered herein by the Deputy Commissioner on June 20, 1966, is unsupported by substantial evidence and contrary to applicable law and that petitioner is entitled to compensation benefits, at the rate of $35 per week, from December 20,

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[7]Plaisance v. Collins Industries, Inc., La. App. 1967, 193 So. 2d 816.

1953, subject to a credit of $11,000, during his disability.

It is therefore ORDERED, ADJUDGED and DECREED that the compensation order rendered herein by the Deputy Commissioner on June 20, 1966, be, and it is hereby REVERSED, ANNULLED, RESCINDED and SET ASIDE: that this cause be REMANDED to the Deputy Commissioner and that he is hereby directed to make a compensation order providing for the payment of $35 per week to petitioner, from December 20, 1953, subject to a credit of $11,000, and for an attorney's fee of $6,500.

/s/ Fred J. Cassibry
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
July 26, 1967

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25208

THE FLUOR CORPORATION, LIMITED, and
COMMERCIAL INSURANCE COMPANY of
NEWARK, NEW JERSEY
Appellants,

versus

KENNETH H. CUNNYNGHAM,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 31, 1968)

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM: On the prior appeal of this cause we held that the claimant had met the burden of showing that the evidence before the Deputy Commissioner did not support the order that he was not entitled to compensation for permanent and total dis-

ability within the meaning of the Longshoremen's and Harbor Worker's Act, 33USCA 921 (a). *Cunnyngham v. Donovan,* 5 Cir., 1964, 328 F2d 694. Claimant was awarded compensation in 1953 for temporary total disability and permanent partial disability based on the amputation of one leg above the knee and severe injury to the other. The prior appeal was from the denial of a claim, instituted in 1960, for additional relief.

We noted that the degree of disability was to be measured by the age, education and the industrial history of the claimant, and the availability of work he could do as well as by his physical condition. The case was thereupon ". . . reversed and remanded for a retrial in due course", thus leaving the matter open for submission of additional evidence.

On remand additional evidence directed to the questions of age, education, claimant's industrial history and the availability of work was adduced before the Deputy Commissioner. The claim was again denied. Alluding to our prior opinion, the district court reversed. We affirm.

The decision of the District Court is controlled by the law of the case doctrine. The question presented is whether the evidence introduced on the second hearing was so different as to warrant a different result or whether the former decision of this court was clearly erroneous and works a manifest injustice. For a recent statement of the rule in this circuit where sufficiency of evidence was involved, see *Lincoln Na-*

tional Insurance Company v. Roosth, 5 Cir., 1962 (en banc), 306 F2d 110.

We have carefully considered the evidence offered on the subsequent hearing of this matter. It does not warrant a departure from our prior holding. Nor do we believe that our prior holding was clearly erroneous or that it woks a manifest injustice.

AFFIRMED.

APPENDIX "E"

Evidence at First Deputy Commissioner's Hearing on August 30, 1961

At the hearing before the Deputy Commissioner on August 30, 1961, it was conceded that the employer had voluntarily paid claimant a total of $11,000.00 in disability compensation, which was the maximum limit payable under Section 14 (N) of the Act at that time for partial disability. (See 33 U.S.C. Section 914 (N) N. The last payment of compensation to the claimant was made on January 9, 1960. All during the time that these payments were being made it will be remembered that the petitioner was earning substantial amounts of money in the construction and drafting field. On August 24, 1960, the claimant through his attorney, requested reconsideration of his case on the alleged ground that he was permanently and totally disabled as a result of his 1953 accident.

The claimant testified in his own behalf at the hearing and presented lay witnesses to support his claim of permanent and total disability. Upon cross examination, claimant stated that his first employment following the injury on December 30, 1953, was on a school project commencing on or about May 24, 1955, in Kellogg, Idaho; that he had been sent out on the job, "by the union" (T. 51-52); that the work consisted of installing steel window frames, steel handrails and other incidental metal works; that he was paid the union scale; that he was so employed from May 24, 1955 to August 26, 1955 (T. 52-53; respondent's exhibit A, showing an hourly rate of $2.85 and an increase to $2.97, with a regular work week of 40 hours); (Also see Respondent's Exhibit B and C showing the efficiency with which claimant had worked, and that "he was well worth his pay", and had been laid off on the completion of this particular contract.); that his next job was in September, 1955, when he worked in a steel construction for two days on handrail; that he was sent out by the union to this job and received the union's scale rate of pay (T. 55-56); that he worked for the American Bridge Company "putting up handrails" in 1956 (respondent's Exhibit D indicates that under work history that his period of employment was from April 1956 to September, 1956 and that claimant had been paid at scale rates); that he was sent out by the union to that job (T. 57); that he left this job "to work with prints" (T. 59); that from September 1956 to January, 1959, he worked for the Fluor Corporation, the same employer for whom the claimant was working at the time of his injury in 1953, as a "designer

C" (T. 60). That his duties as a designer C involved mental rather than manual work in the field of drafting and reading blue prints in an office (T. 79-80); that during his employment he received two or maybe three wage increases (T. 62-63); Respondent's Exhibit L, showing substantial hours of overtime, as much as fifteen hours in one week); that his employment terminated on January 7, 1959, due to a reduction in force (T. 63-64); that he then went to work as a welder burner with Pacific Scientific from June 15, 1959 to July 31, 1959; that during his employment with Pacific, he made thirty-three hours overtime, Respondent's exhibit F; that he left this employment to return to the Fluor Corporation as a designer C (T. 64; respondent's Exhibit D and E, the latter reciting that "he was able to perform this job satisfactorily"); that he worked for the Fluor Corporation until some time in November, 1959, when he asked for and was granted a 90 day leave of absence to visit his father who was ill (T. 66-67); that he did not go back to work for Fluor because work had decreased (T. 67; Respondent's Exhibit G); that he is able to drive his own car and does so on extensive trips; that he mows his mother's lawn with a power mower (T. 71); that he has done odd jobs such as hooking up a wire in the attic of a house; that he is a high school graduate and can read and write (T. 73)

Second Hearing by Deputy Commissioner
On November 15 and 16, 1965

The purpose of the second hearing was to consider

the extent of claimant's disability in light of the Fifth Circuit's directive that it looked at the economic sense of disability and the age and availability of work for this claimant. With respect to this issue, witnesses testified in the second hearing as follows:

Kenneth H. Cunnyngham that he was at the time of the hearing forty-eight years of age and that he had graduated from High School, that prior to the date upon which he had been injured, he had been employed for various employers as a laborer, truck driver, warehouseman, welder, shipbuilder, and construction worker (T. 9-16); that during this period of time he had enlisted in the C. B.'s, (a navy civilian batallion) in November 1942 from which he was medically discharged in June, 1943; *that he has not attempted to find any work since the date of his first hearing on August 30, 1961.* (T. 21), but he has applied for State relief; that the Louisiana vocational rehabilitation center sponsored him over several months in a course estimating construction jobs, but he abandoned the course with its possibility for employment because his car broke down (T. 22); that he has neither looked for a job in pipe design nor in drafting nor in welding since August 1961.

During the second hearing by the Deputy Commissioner a Mr. Ford from a local machine works company said he would offer Mr. Cunnyngham a job if he passed the welding test. When Mr. Cunnyngham was offered the opportunity to take a standard test, this was his reply "well, Mr. Donovan, I don't think it is fair, because I tried that shop work in Los Angeles,

and it was not only harmful to me but it puts me in a position where I might hurt somebody else. *And I don't think it is fair to force me to go to work in his shop or in anyone else's.* But I know in my own mind that I am just not — I just can't hold a job down. * * * I have enough wrong with me now without getting in a position where it could be worse. There is nothing worse than just constant pain, not a thing in the world and I have lung trouble that I was discharged from the C. B.'s with and now you put me in a smokey shop." (T. 44-45) Mr. Donovan then said I don't know what kind of facilities they have there, to which Mr. Cunnyngham replied well I will just do it, but so far as being in that position, I don't think it is right. Thus, it is evident from Mr. Cunnyngham's pre-disposed mind that he could not hold a job, it is not surprising that he did not pass a basic welding test.

The next person to testify in the second hearing was William F. Ford who was the general manager of Ike Haggard Machine Works (T. 34); Mr. Ford stated *that welders and burners are in demand in the New Orleans area; and that the claimant's physical condition with respect to his legs would not prevent his being hired by his firm. (T. 35);* before hiring Mr. Cunnyngham however Mr. Ford mentioned that there would need to be a test in order to determine whether the petitioner was a qualified welder; that the claimant, as a certified welder, would be paid no differently from other welders doing the job; that as of the present time, there is very much of a work demand for the claimant; that if the claimant could

pass the test, he could start working in the morning (T. 39); that he would then have employment as long as there was work to be done; that the witness knows of other companies which offer the same kind of work to handicapped persons; that, at the present time, the witness has two one-armed welders working for his firm and that they are being paid the going scale of wages; that to be hired, claimant would have to go through a personal interview and a test which would take two or three hours (T. 43); that after much reluctance the claimant finally consented to take the test and interview; the following day, the test and interview was given to the petitioner; that Mr. Ford testified the next day that he witnessed the test taken by the petitioner on the preceding afternoon (T. 64); that from claimant's manners at the time, he left the witness with "the distinct impression *that he was not very interested in becoming an employee of Ike Haggard Machine Works*"; that this was based on the way in which the claimant handled his welding torch before and during the test (T. 65-66); that claimant had not conducted himself as a certified welder (which claimant was) would do (T. 66); that while techniques may become rusty from non-use for a while, a welder still would know the fundamentals of his work even after ten years being away from it. (T. 67-68)

The next witness to testify was William D. Mabury, who was the welding foreman for Ike Haggard Machine Works (T. 52); that he has given welding tests for the employer to certified welders for some

twelve years, including handicapped welders, who had lost both limbs; that he had administered a welding test to the petitioner the day before; that "when he got ready to take the test, he (petitioner) didn't ask what welding machine he was using, which is usual for a welder"; that it is *fundamental* for a welder to know the type of machine he will use in order to pre-adjust it for the work to be done (T. 53-55); that although claimant, at the completion of the test professed that he had tried (T. 56-57), his result was not "any good at all"; that the witness did not think, however, that claimant had actually tried as hard as he could have; that *in the first place he didn't seem too interested in it.*" (T. 57); that the manner in which he was welding during the test in claimant's preparatory activities, or lack of them, were, to the witness, violations of basic fundamentals of welding which a certified welder would not do even if he had not welded for some time (T. 57-59); that a person who had not welded in ten years "should know how to set his machine and how to space nipples, and what rods to use, because that is something he should not forget" (T. 59-60).

APPENDIX "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,208

THE FLUOR CORPORATION, LIMITED, and
COMMERIAL INSURANCE COMPANY OF
NEWARK, NEW JERSEY,
Appellants,

versus

KENNETH H. CUNNYNGHAM,
Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

(Nov. 29, 1968)

(On Petition for Rehearing)

Before GEWIN and BELL, Circuit Judges and
BOOTLE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.